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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 511

THE NEW NEGRO ALLIANCE, A CORPORATION, ET AL.,
Petitioner,

vs.

SANITARY GROCERY CO., INC., A CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

BELFORD V. LAWSON, JR.,
THURMAN L. DODSON,
EDWARD P. LOVETT,
Counsel for Petitioners.

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Statement.

This case involves the construction and interpretation of Section 13 of the Act of March 23, 1932 (47 Statute 70), called The Norris-LaGuardia Labor Disputes Act, as limiting the jurisdiction of Federal courts in restraining peaceful picketing in cases involving labor disputes as defined by that Act.

The case arises upon an appeal from a final order and decree from the District Court of the United States for the District of Columbia, permanently enjoining the New Negro Alliance, a Corporation, and two of its officers, William H. Hastie and Harry A. Honesty, from picketing or boycotting a particular retail grocery store of the Sanitary Grocery Stores, Inc., or any other store of the Sanitary Grocery Stores, Inc., in the District of Columbia. The question was heard and finally disposed of upon the bill and answer (see opening statement of permanent injunction, R. 21).

The respondent, the Sanitary Grocery Co., is a corporation operating a number of retail grocery stores in the District of Columbia. The petitioner, New Negro Alliance, is a membership corporation organized for the betterment and mutual advancement of its members. William H. Hastie and Harry A. Honesty (hereinafter designated as "defendant officers") were, when the case was filed, Administrator and Deputy Administrator of the New Negro Alliance. The present controversy arose out of a request made by the petitioners upon the respondent through the petitioners' officers on behalf of persons seeking employment that the respondent adopt a policy of employing Negro clerks in certain of its retail grocery stores. The refusal of the respondent to grant or even acknowledge such requests

and the discontinuance of the employment of Negro clerks in certain stores of the respondent are the matters in controversy.

The actual conduct of which the respondent complains and upon which this suit was founded was the *peaceful patroling of a single person in front of one of the respondent's stores on a single day.* This person acted on behalf of the petitioner and carried a placard exhibiting the legend, "DO YOUR PART! BUY WHERE YOU CAN WORK! NO NEGROES EMPLOYED HERE!" It is stated and admitted in the record that "the information conveyed by the placard borne as aforesaid was wholly true and was not intended and did not in fact coerce or intimidate customers of the respondent" and that none of the petitioners nor any picket or other person acting on behalf of any of the petitioners has physically hindered, obstructed, interfered with, delayed, or harassed persons desiring to enter the place of business of the respondent, or acted in a disorderly manner or caused or encouraged crowds to gather in front of the said store. Throughout the period of picketing the situation was substantially that revealed by photographs which were exhibits to the respondents' bill and appear in the present record (R. 13, 14, 16).

It is also set out in the record that the petitioners were not party to any conspiracy (R. 16); that the acts complained of other than to make the aforesaid requests upon the respondent, and in making such requests they acted solely as agents of petitioners, who were potential employees, consumers, and discharged employees (R. 15, 16); and that the petitioners have not requested the discharge of any present employees of the respondent, but have merely asked that the respondent adopt a policy of giving employment to Negro clerks in the regular course of personnel changes.

Questions of Law Presented.

1. Whether an association of Negroes organized for the purpose of securing better employment opportunities in business enterprises located in Negro residential and business districts and whose patronage is practically 100% Negroes has such "direct or indirect interest therein" in said business enterprises as to precipitate a labor dispute by the said Negro association and the management of said business enterprises when said Negro association endeavors to persuade the management of said business enterprises, by negotiations and peaceful picketing, to adopt a policy of employing Negro clerks in said stores located in Negro communities and supported by them is within the purview of Sec. 13 (a) and (b) of the Norris-LaGuardia Labor Disputes Act passed by Congress, March 23, 1932 (47 Stat. 70)?

2. Whether such dispute as described, *supra* (Questions of Law #1) between the said association and management of a retail grocery store is a labor dispute within the contemplation of Section 13, paragraph c of the said Act, which defines labor disputes as follows:

> "(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representations of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*"

3. Whether under Section 13 of the said Act of March 23, 1932 (47 Statute, 70), the peaceful patrolling of a single person in front of one of respondent's stores, located in a Negro business district (see R. 14) for the purpose of making known to the public the respondent's refusal to negotiate

with the petitioners "concerning the terms or conditions of employment, or concerning the association or representations of persons in negotiating, fixing, maintaining, changing, regardless of whether or not the disputants stand in the proximate relation of employer and employee," is a labor dispute where the respondents have discontinued the services of persons represented by the petitioners and refused to give those persons or other persons of the particular group to which they belonged opportunity for employment in a newly opened establishment?

4. Whether or not the injunction issued by the lower court and sustained by the Appellate Court in its broad and all inclusive scope, which prohibits the petitioner from negotiating, peacefully picketing and boycotting in any capacity (R. 22), nullifies that portion of Section 13, paragraph c, of the Norris-LaGuardia Labor Disputes Act, which specifically provides for the representation of employees?

5. Whether that part of the injunction which enjoins petitioner from boycotting respondent's business and virtually compels and in effect orders petitioner to trade at respondent's store violates the right of personal liberty safeguarded by the Fifth Amendment to the Constitution of the United States?

6. Whether that part of the injunction which enjoins the petitioners from inducing persons not to do business with respondent violates the right of free speech guaranteed by the First Amendment of the Constitution of the United States?

7. Whether as a matter of general Federal law peaceful picketing and patrolling as admitted by the respondent (see R. 13, 14) is illegal?

Reasons for Granting Petition.

1. It is generally conceded, even by the most casual observers of social-economic problems in this country, that the Negro group, being the marginal class in the economic life of the nation, has been the hardest hit during the period of stress and strain through which we have lately and are still passing. It is equally generally agreed that the present economic plight of the Negro is an integral part of the general social and economic structure of this country. It has become axiomatic that the Negro is the first to be fired and the last to be hired. Denied employment opportunities in many avenues open alike to other citizens and often non-citizens, as a matter of self-preservation, the Negro has been forced to adopt a technique to obtain from those concerns which live by Negro patronage recognition in employment, to which, under all the circumstances, he is justly entitled.

2. This discrimination against Negro labor by concerns situated in Negro communities and supported by Negroes contributes its part toward the pauperization of the Negro and aids in keeping the standard of living for Negroes down and below the level of that of other groups in the population. Since the Negro does not sit on the Boards of Directors of corporations whose enterprises, conducted in Negro communities, help to swell the profits of those corporations, the Negro has been compelled to inaugurate campaigns such as the one complained of in this suit, to persuade the management by negotiations and/or peaceful picketing to give recognition in employment in those concerns which depend for their existence on Negro patronage. To deny the Negro this right is to take from him his only defense against a discriminatory policy which jeopardizes his economic security and dooms him forever to accept the crumbs from the table which his patronage has prepared.

3. Just as it is the concern of the community in general to see to it that the health standards of all groups are raised to, and maintained at, a level of safety so it is the concern of the community that all groups have at least a semblance of economic security. The wealthy inhabitants of Sixteenth Street and Chevy Chase should be as interested in the health standards of poor unfortunate Negroes living in Bland Court and York Alley as in the health standards of their own immediate communities. This is evident when we realize that the persons who handle their foods before it reaches their homes, the cooks who prepare their meals, the nurses who care for their babies, and those who are the care-takers of public and private buildings may come from a diseased-infected court, alley or community. In like manner, if Negroes are denied employment, they become a public charge, swell relief rolls, increase the prison population, and even endanger the personal safety of all citizens, the costs in all instances being borne from the purses of citizens apparently far removed from it all. To deny the Negro the right to work for an honest living is tantamount to denying him the right to live.

4. In recent years there has been a steady drive to increase and to better conditions of employment. There has been developing what is referred to as a larger pattern of social justice. During this time peaceful picketing and the boycott have been universally used to improve conditions of employment. These devices have been used also to force employers to recognize particular unions and their right to organize within the ranks of employees even before the relationship of employer and employee had actually been established. Or, expressed in other language, unions composed of non-employees have used the device of picketing industrial establishments to force the management to grant them the opportunity to organize the employees already in said establishments into unions. Also, unions, frequently

picket establishments which refuse to give employment to persons who are affiliated with unions. There appears to be no difference between these situations and the dispute involved in this case other than in this case those seeking to arrange conditions of employment happened to be identified as members of the Negro race. In the equation of justice there is no element of color.

5. The decision of the court below holding this dispute to be simply a racial dispute and, therefore, without the purview of the Norris-LaGuardia Act, is palpably erroneous. The Act was designated to protect "labor disputes" from interference by the injunctive power of the Federal equity court. Simply because the "terms and conditions" of employment happen to include the racial identity of the disputants it is none the less a labor dispute in essence and falls within the language and intent of the Act.

6. This Court cannot possibly allow the dictum of the majority opinion to stand undisturbed, which dictum, as clearly pointed out in the minority opinion, puts a limitation on the scope of the Act which is clearly repugnant to the Act itself.

7. The case here presented is one of great importance to a large segment of the population since it involves the right of Negro labor peacefully to picket. This is especially true since the right peacefully to picket has already been upheld by this Honorable Court.

8. The decision of the court below in holding this to be merely a racial dispute discriminates against the Negro as a group because the sole difference between the present case and those cases cited and relied upon by the lower court as authority is that in the instant case Negro labor has been discriminated against rather than organized labor generally. The nature of the controversy is the same in

either case. To say that the Act governs controversies concerning discontinuance of union labor generally but does not concern discrimination against Negro employees is to read into the Act a limitation which is neither expressly stated nor fairly implied. It is the subject matter of each controversy which determines whether or not a labor dispute is involved, even though the basis of classification of those seeking work or those dropped from the rolls may differ.

9. Grave doubt has arisen in the District of Columbia with respect to the proper construction, interpretation and application of the Norris-LaGuardia Labor Disputes Act and it is respectfully urged that an expression from the Supreme Court of the United States as to whether or not the said statute is applicable to the facts in this case, namely: non-violent, peaceful picketing, by an association seeking to arrange the terms and conditions of employment of prospective employees and of discharged employees.

Belford V. Lawson, Jr.
Thurman L. Dodson,
Edward P. Lovett.

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No. 511

THE NEW NEGRO ALLIANCE, A CORPORATION, ET AL.,
Petitioner,

vs.

SANITARY GROCERY CO., INC., A CORPORATION.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the United States Court of Appeals for the District of Columbia was rendered July 26, 1937 (R. 26), and is not yet reported.

II.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia was entered on July 26, 1937.

Jurisdiction of this Court is invoked under paragraph (c) of Section 5, of Rule 38 of the United States Supreme Court and Section 240 of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938.

III.

Statement.

A statement of the facts and the questions involved will be found in the petition for a writ of certiorari (p. 2).

IV.

ARGUMENT.

I.

The record reveals no unlawful act of the petitioners upon which injunctive relief against picketing might be predicated.

It will hardly be disputed that to justify such relief as has been sought and granted in this case there must be both unlawful action by the defendant and injury to the plaintiff. The mere fact of injury, actual or threatened, is not enough. That injury must result from acts which are themselves wrongful. Thus the gravamen of the present complaint is that the defendants have threatened and intimidated customers, indulged in disorderly conduct, joined in an unlawful conspiracy and made false representations about plaintiff and its business, all to the irreparable damage of the plaintiff. In brief, it is alleged that various torts, legal wrongs, have been committed by the petitioners and that a court of equity should enjoin these wrongs because there is no adequate remedy at law. If the denials and allegations of the answer, the truth of which has been admitted upon the present record, show that no such wrongs have been committed, there is no proper basis for the injunction.

a. The records shows no actual or threatened interference with respondent or its customers by petitioners through force, threats, disorderly assemblage or destruction of property.

The answer expressly denies all allegations of tortious conduct. Moreover it is expressly alleged that the peaceful patrolling of a single person upon the public sidewalk in front of the respondent's store during the business hours of one day was the only conduct attributable to the petitioners, or any of them. The exhibits to respondent's bill (R. 13, 14) are accurate pictorial representations of that conduct.

Although a few State courts have taken the position, erroneously it is submitted, that any picketing or patrolling is disorderly and threatening, the settled rule of the Federal courts is that the factual situation of each case determines whether disorder, intimidation or other unlawful conduct is involved in picketing. Thus, in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, this Honorable Court was careful to distinguish between peaceful persuasion, lawful procedure not subject to injunction, and action of intimidating or violent character. This Honorable Court further pointed out that a single picket might lawfully be stationed at each entrance of the establishment in question though a crowd or large number of pickets would be unlawful by reason of their tendency to intimidate. It was in this case that Mr. Chief Justice Taft pointed out that "the purpose of injunction should be to prevent the inevitable intimidation of the presence of groups of pickets but to allow missionaries."

Similarly, in *Davis* v. *Henry*, 266 Fed. 261 (1920), the Circuit Court of Appeals for the 6th Circuit, in setting aside an injunction stated:

> "The order appealed from went too far in enjoining against 'interfering in any way—directly, or indirectly, with the plaintiff—and from picketing highways or means of ingress and egress to and from said plant of

said buggy company'—acts which do not necessarily constitute an unlawful interference."

The court below previously has been careful to limit injunctions against interference with business to the restraining of acts of violence or the coercion or intimidation of customers.

American Federation of Labor v. *Buck's Stove and Range Co., 33 App. D. C. 85;*

Bender v. *Local Union, No. 118, W.L.R. 574.*

It is to be emphasized that this question of whether or not the acts complained of are themselves tortious or otherwise illegal is not dependent upon the relation of the parties or the nature of the controversy. And the Federal doctrine is clear that the peaceful patrolling of a single person in front of a place of business so as to make known a complaint against that business is not of itself a disorderly or intimidating act.

b. The records shows no conspiracy among the petitioners.

The answer categorically denies that the defendants have been party to any conspiracy (R. 16). And there are no undenied allegations of the bill upon which a finding of unlawful concert can be predicated. The individual petitioners were not connected in any way with the picketing. The answer shows that the defendant corporation, and it alone caused the picketing (R. 16) and that the defendant officers did no more than to write to the plaintiff requesting certain changes in employment policies. Quite apart from the legality of these ends, there is no showing whatever that the parties conspired with each other or with any other person or persons.

c. The record shows no misrepresentation of fact.

The record shows, and is not disputed, that the placard carried by the picket told the truth. Indeed, there is no allegation in the bill that the petitioners have made any misrepresentation of fact. It is alleged that the petitioners had threatened to make false representations that the respondent did not employ colored persons (R. 3) but this allegation is denied (R. 15).

d. Cases involving "mass picketing" and other intimidating conduct are distinguishable.

Illustrative of the distinction between the instant case and a case involving intimidation or otherwise unlawful conduct is *Green* v. *Samuelson*, 168 Md. 421. There, in a controversy somewhat similar to the one at bar the court ordered a modification of an injunction restraining all acts interfering with defendant's business, pointing out that the group of Negroes there asserting demands for employment should not be restrained from lawful acts of asserting, publicizing or seeking support for their demands, but merely from mass picketing and acts calculated to intimidate rather than persuade others.

The oral opinion of the trial court (R. 18, 20) relies upon *King* v. *Weiss & Lesh Mfg. Co.*, 266 Fed. 257 as authority for the issuance of the injunction in this case. But in the *King* case mass picketing had resulted in intimidation of employees and the trial court had so found. The Circuit Court of Appeals ruled that the question of intimidation was a question of fact upon which the evidence justified a finding that employees had been intimidated. ***In the present case the facts as set forth by both respondent and petitioner affirmatively show the absence of intimidation.*** Thus the *King* case is a precendent for denying, rather than for granting an injunction in the instant case.

The trial court also relied upon *Beck* v. *Railway Teamsters' Protective Union*, 118 Mich. 497. Though this is a leading case in a jurisdiction far less liberal than the District of Columbia or the Federal jurisdictions generally in permitting picketing, it does not support the present injunction. There had been force and violence, and admittedly so, in the *Beck* case. There had been intimidation. Mass picketing had occurred. The rationale of the decision is that intimidation as well as physical violence may be restrained. There is no intimation that picketing would have been restrained in the absence of intimidation, although violence and intimidation were deemed justification for banning all the acts responsible for such results. Thus, this case is not in conflict with the Federal doctrine of permitting peaceful persuasion through picketing or otherwise in the absence of violence or intimidation.

The only tenable doctrine in cases involving no violence, threats or intimidation has been thus expressed in a case involving picketing by consumers protesting the price of bread at the picketed bakery:

> "I conceive that it is clear in reason and principle that picketing not accompanied 'by violence, threats or intimidation, expressed or implied' and having a lawful purpose should not be enjoined. • • •
>
> "The right of an individual or group of individuals to protest in a peaceful manner against injustice or oppression, actual or fancied, is one to be cherished and not to be prescribed in any well-ordered society. It is an essential prerogative of free men living under democratic institutions. And it is salutary for the State in that it serves as a safety valve in times of stress and strain."
>
> *Julie Baking Co.* v. *Graymond*, 274 N. Y. Supp. 250.

To the same effect is a recent Missouri decision:

> "It is said, however, for the City that John Smith, a member of the public, has no right for his own private purposes, whatever they may be, to take his stand for a period of two hours every day upon a particular portion of the street * * *. That he has such a right there can, in our opinion be no question, providing he conducts himself in a peaceful, orderly manner, disturbs no one, and commits no overt act. In this case, according to the testimony of the officer who made the arrest, he arrested the defendant for the purpose of preventing him from doing picket duty. * * * If these defendants are not permitted to tell the story of their wrongs, or, if you please, their supposed wrongs, by word of mouth or with pen and print, and to endeavor to persuade others to aid them by all peaceful means, in securing redress of such wrongs, what becomes of free speech, and what of personal liberty * * *?"
>
> *City of St. Louis* v. *Gloner*, 210 Mo. 502.

It is submitted that upon the record the petitioners have done no unlawful act and that, therefore, the injunction against them was improvidently and erroneously issued.

II.

The court erred and infringed the petitioners' rights of free speech and personal liberty by restraining them from "boycotting" respondent's business and peacefully persuading others not to patronize that business.

The paragraph of the permanent injunction numbered "2" (R. 22) contains a general prohibition against "boycotting" respondent's business and paragraph "3" prohibits any "inducement" of persons not to do business with the plaintiff. This language prohibits the defendants from refusing to trade with the plaintiff and prohibits them from peacefully persuading other persons to refrain from trad-

ing with the plaintiff. It is to be noted that these prohibitions are additional to and distinct from the prohibition against picketing.

In modifying a similarly inclusive injunction in *American Federation of Labor* v. *Bucks Stove and Range Co.*, *supra*, the court made the following statement which is as applicable to the present injunction as to the one then under consideration.

> "We have no power to compel the defendants to purchase complainant's stoves; we have no power to prevent defendants, their servants and agents, from preventing others from purchasing from them." (at p. 110).

In the same way the court in *Bender* v. *Local Union*, *supra*, refused to restrain the defendants from their efforts to persuade others not to deal with the plaintiff and found that such acts, if peaceful and not intimidating, are not unlawful.

But the prohibition against refusal to trade with respondent or peacefully persuading others similarly to refuse is not only error as a matter of established principles of equity, it is also a denial of Constitutional rights of personal liberty. In *City of St. Louis* v. *Gloner*, *supra*, the Missouri court held that even a denial of the right to picket peacefully "infringes upon the right of personal liberty, and is unreasonable and oppressive." Similarly, in *Segenfeld* v. *Friedman*, 193 N. Y. Supp. 128, the right of peaceful persuasion, whether through the device of picketing or other means of publication, is described as a Constitutional right.

> "I know of no sound principle of law which prohibits orderly picketing, or that which does not transgress on the rights of others. Indeed, a great body of law affirmatively establishes the opposite proposition. The right to picket is founded on constitutional principles,

and although it might appear that some recent adjudications in certain jurisdictions encroach upon this right, the constitutional, guaranty still survives and must be respected and upheld." (At page 130.)

It is submitted that the trial court restrained acts which Congress itself could not prohibit without infringing the right of free speech guaranteed by the 1st Amendment of the Constitution and the right of personal liberty safeguarded by the 5th Amendment of the Constitution of the United States.

III.

The court erred in holding that the controversy here is not comprehended by the N. L. Act of March 23, 1932.

The preceding argument has been directed to the issues of general law presented by this case quite apart from any statutory restriction upon the jurisdiction of the court. It remains to consider the effect of the Act of March 23, 1932 (47 Stat. 70) which deprives courts of the District of Columbia of power to restrain peaceful picketing in cases involving "labor disputes" as defined in that Act and prescribes procedural prerequisites for the issuance of any injunction in a case involving a "labor dispute." It is not denied that the injunction was issued in this case without compliance with such requirements and that, if this case is within the purview of the statute, the action of the trial court was improvident and in excess to its jurisdiction.

Section 13 of the Act describes the situations involving labor disputes to which the statute applies:

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interest therein; or who are employees of the same employer; or who

are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers (2) between one or more employers or associations of employers and one or more employer and associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined.).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representations of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

"(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia (March 23, 1932, c. 90, 13, 47, Stat. 73)."

The matters in controversy were (1) the discontinuance of the services of employees of a particular group by the respondent and (2) the refusal of the respondent to give this group opportunity for employment in a newly opened

establishment. Acting on behalf of the group thus discriminated against in employment, the petitioner Alliance is properly deemed to be engaged in a labor dispute within the meaning of the statue. Thus, the record shows that the case "involves conflicting interests in a labor dispute of persons participating or interested therein" as shown by the circumstances that "relief is sought against" the petitioners, that the petitioner Alliance represents persons seeking employment in respondent's business and as such representative has "direct or indirect interest" in the "occupation in which such dispute occurs," and that this dispute is a "controversy concerning the association of persons seeking to arrange terms or conditions of employment."

The fact that none of the petitioners were employees of the plaintiff is immaterial. The courts have been clear in the few cases that have arisen under the 1932 Act that the statute protects so-called "outsiders" attempting to change employment policies even though present employees make no complaint.

Levering and Garrigues Co. v. *Morrin*, 71 F. (2d) 284;
Miller Parlor Furniture Co. v. *Furniture Workers*, 8 F. Supp. 209;
Cinderella Theatre Co. v. *Sign Writers' Local Union*, 6 F. Supp. 164.

The sole difference between the present case and those cited is that Negro labor has been discriminated against rather than organized labor generally. The nature of the controversy is the same in either case. To say that the 1932 Act governs controversies concerning discontinuance of union labor generally but does not concern discontinuance of Negro employees is to read into the Act a limitation that is neither expressly stated nor fairly implied. The

subject matter of each controversy makes it a labor dispute although the basis of classification of those seeking work or those who have dropped from the rolls, may differ.

IV.

Conclusion.

The petitioners respectfully submit that the order of the trial court and the decree of the Court of Appeals be reversed.

Respectfully submitted,

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